FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 21 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 191.

JERRY GIRARDI,

Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY
and
LIPSETT, INC.,

Respondent,

v.

ANDER SHONIS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

B. NATHANIEL RICHTER,
CHARLES A. LORD,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 S. Broad Street,
Philadelphia 7, Pa.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 191.

JERRY GIRARDI,

Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY

and

LIPSETT, INC.,

Respondent,

v.

ANDER SHONIS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief (designated "Answer") in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

Petitioner's Evidence on the Issue of Right to Control Was Charged Out of the Case and in So Doing the Trial Court Deprived Petitioner of His Undisputed Right to Trial by Jury Under the Constitution and the Decisional Law.

The burden of respondent's "Answer" in this proceeding is readily identified. It claims very simply that ". . . all the evidence in the case"[1] on the issue of right to control was submitted and therefore, it argues, petitioner received trial by jury on the issue of statutory employment. Thus, it says, the demands of the Seventh Amendment to the Constitution of the United States and the decisional law of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958) and *Magnuau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959) were satisfied.

It is of great importance that respondent does not dispute or remotely question our contention that the Seventh Amendment compels a jury trial on the issue here. This silent concurrence with our view adds strength to points "2" and "3" in our "Reasons for Granting the Writ." This Court expressly reserved decision on the issue in *Byrd v. Blue Ridge Rural Electric Cooperative*, *supra*. It is now ripe to be ruled upon.

Respondent's resistance to the petition collapses if it is a fact that petitioner did not have all his proffered evidence on the issue of statutory employment submitted to the triers of fact—the jury. These are the realities.

1. By written admissions, oral testimony and undisputed fact, petitioner proved respondent's *total* absence of

1. "Answer", p. 2 in respondent's "Counter-Statement of Question Presented."

possession or actual control between July 25, 1955 and the date of the accident—November 5, 1955 (66a, 81a-84a, 90a, 91a).

2. We submit, and the lower courts and respondent do not dispute, that a right to control can be abandoned. (See, for example, respondent's agreement in principle in its supposititious case at page 9 of its brief.)

3. Both lower courts were pointedly confronted with our contention that all our evidence on abandonment, which was absolutely material to the issue of right to control, was prejudicially stripped from the case, and yet neither court ruled on the point.

4. The evidence was taken from the consideration of the jury in these unequivocal terms of the trial judge:

> "The Court: Members of the jury, the fact that none of Lipsett's employees remained at the plant after Ander Shonis commenced work under his subcontract *has no bearing on the statutory employer status of Lipsett.* The point that I made and I am leaving with you is this: It is the right of control that governs . . ." (143a) (Italics ours.)

The italicized words are logically and legally erroneous, for if this right to control can be abandoned, as respondent admits it can, then the evidence in question has a *total* bearing on statutory employer status.

In an effort to blunt the excisional effect of this instruction, respondent says at page 9 of its brief:

> "From these excerpts from the charge and ruling, it is apparent that the trial judge made plain to the jury beyond all question, that Lipsett's absence from the premises at the time of the injury was of no importance; that the only question for their determination was whether Lipsett still retained the *right* to control the work—that *absence* from the premises, which Lip-

> self admitted, was not the issue in the case; the issue was *right* to control, which the jury was to decide '*from all four corners of the case.*' "

But the entire point of our argument is that like proof on any other jury issue, evidence is the be-all and the end-all. The question of whether or not respondent retained the right to control is answerable by material evidence. Respondent claimed its material evidence of right to control was that it could tell Ander Shonis where to ship the scrap. Over our objection, this evidence of respondent went to the jury although it was no more probative of right to control than is proof that when one tells a cab driver his destination he controls the driver. See Restatement of Agency, Section 227, p. 502. Our evidence was quite extensive, was highly probative of abandonment of any right to control respondent may once have had and was completely undisputed. It went to the root issue in the case. A jury could have found for petitioner had it been permitted to consider that proof.

We have never contended that the issue was absence from the premises, and for respondent to suggest that is a confession of profound weakness in its position. Of course absence is not the issue. *But it is evidence on the real issue* of right to control and it should have gone to the jury. It did not. And nothing can change that ruling which was so fatal to petitioner's case.

CONCLUSION.

The Writ should issue.

Respectfully submitted,

B. Nathaniel Richter,
Charles A. Lord,
Seymour I. Toll,
Richter, Lord & Levy,
Counsel for Petitioner.